IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 454 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAROTTAMBHAI RANCHHODJI PATEL THROUGH HIS LEGAL HEIRS

Versus

PRABHAVATI WIDOW OF SUNDERLAL ZAVERLAL DESAI

Appearance:

1. First Appeal No. 454 of 1977

MR SH SANJANWALA for appellant Nos.1-1/7

..... for respondents Nos. 1-2,4-6,9-11

MR KI SHAH for respondent No. 3

MR BJ SHELAT for GN SHAH for respondents Nos.7-8

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 09/11/2001

C.A.V. JUDGEMENT

This First Appeal by the appellant-original

plaintiff is filed against the judgment and order dated 31st December, 1976 passed by the learned Civil Judge (Senior Division), Surat in Special Civil Suit No.47 of 1972 whereby the defendant Nos.1 and 8 were ordered to deposit an amount of Rs.16,949/- towards rent failing which, plaintiff to recover vacant possession of suit land from the defendants together with rent from 22-3-1969 till the date of filing of the suit at Rs.199/per month plus mense profits at Rs.199/-per month.

2. The facts leading to file the present appeal are as under:

2.1 A piece of land admeasuring 200 feet by 200 feet of the ownership of plaintiff from Survey No.159, Hissa No.13 of Village Kodara, Taluka Palsana, District Surat, was let out to deceased-Sundarlal Zaverlal Desai and defendant Nos.5 and 6 for installing only a patrol pump and a small cabin at a monthly rent of Rs.199/-. The tenancy was to start from first of English Calendar month to the last date of the month. Electricity bill was also to be paid by the plaintiff apart from electric fitting work. The defendant Nos.1 to 4 are the heirs of deceased Sundarlal Zaverlal Desai. According to plaintiff, the defendants have committed breach of the agreement not only by subletting the suit land by defendant Nos.1 to 6 to defendant Nos.7 and 8, who again sublet the same to defendant Nos.9 to 11, but the defendant Nos.6 and 7 made construction in contravention of the plan by making permanent structure on the land also. It was stated by the plaintiff that though he is entitled to recover rent from 1-7-1964, it was held in Regular Civil Suit No.20 of 1965 and in Regular Civil Appeal No.3 of 1970 that plaintiff would be entitled to recover rent from 17-1-1965 onwards and hence, a notice was served upon the respondent Nos.1 to 6 to pay him an amount of Rs.16,915/-being the rent for the period from 17-1-1965 to 29-2-1972 at the rate of Rs.199/- per month together mense profit of Rs.34/-. Since the defendants did not pay the due amount to him, a suit being Special Civil Suit No.47 of 1972 was filed before the Court of learned Civil Judge (S.D.) claiming the aforesaid amount.

2.2 The defendant Nos.1 to 4 and 6 did not file any written statement.

2.3 However, defendant No.5 filed written statement at Ex.39 contending that suit is filed in collusion with defendant Nos.6 and 9. Since the defendant No.7 wanted to start a patrol pump, he along with deceased Sundarlal found out the suit land suitable for patrol pump and

hence, a fraud was committed by the defendant Nos.6 to 9 against Sundarlal and defendant No.5 gave dealership to defendant No.9. It was further contended that suit land was hired for a period of 20 years and it expires on 14-10-1983 and hence, the suit was premature and plaintiff would not be entitled to claim possession of the suit land. The construction of only a small cabin and patrol pump on the suit land is not admitted by defendant No.5 and according to him, subletting of the suit land is not barred as per the rent note. It was not admitted that defendant Nos.9,10 and 11 were the sub-tenants of defendant Nos.7 and 8. It was further contended that since the construction was made as per the plan, defendant Nos.1 to 6 have not committed any breach of the terms of tenancy. It was submitted that the Regular Civil Suit No.20 of 1965 filed by the plaintiff on the same ground was dismissed. Regular Civil Appeal No.3 of 1970 preferred against the dismissal of the suit was also dismissed by the District Court and hence, the present suit by the same party on the same cause of action is barred by the principle of res-judicata. It was denied that rent was due from 1-1-1964 or 17-1-1965 at the rate of Rs.199/- per month and hence, an amount of Rs.16,915/- claimed by the plaintiff towards rent and Rs.34/- towards mense profit was also denied. It was also denied that the suit notice, though not received by him, was not legal and valid. According to him, suit land was not damaged as it was used and occupied by defendant Nos.7 to 11. It was stated that suit was time barred and since Second Appeal No.540 of 1970 filed against the judgment and order rendered in Regular Civil Suit No.18 of 1965 was pending between the parties at the relevant time, suit was not tenable. It was further stated that since the litigations were going on between the parties since 1965 and also since the sub-tenants i.e. defendant Nos.7 and 8 did not pay any rent to defendant Nos.1 to 6, the plaintiff would not entitled to recover any rent from defendant Nos.1 to 6 till the proceedings are concluded and hence, the suit be dismissed with costs.

2.4 The defendant Nos.7 and 8 also filed written statement at Ex.58 contending that since they were authorised to sublet the suit land vide rent note dated 15-10-1963 executed between the deceased Sundarlal and the defendant Nos.5 and 6, suit land was sublet to the defendant Nos.7 and 8, the lawful sub-tenants. It was also contended that though they were entitled to sublet the suit land, they denied to have sublet the suit land to defendant Nos.9, 10 and 11. According to them, defendant No.9 was a dealer of patrol pump and defendant

Nos.10 and 11, who were rendering services to the customers visiting the patrol pump, were neither sub-tenants or licensees nor the suit land has been assigned or transferred to them. They also denied to have made more construction than what is shown in the plan. Though necessary constructions were permitted to be carried out by the plaintiff in his presence by spending an amount of Rs.1,50,000/-, this false suit in collusion with defendant Nos.5 and 6 was filed by the plaintiff and though they showed their readiness and willingness to pay rent by replying to the suit notice, same was not accepted by the plaintiff. According to them, plaintiff would be entitled to recover rent from 27-1-1965, i.e. the date of starting of the patrol pump. Since the Regular Civil Suit No.22 of 1965 as well as the Regular Civil Appeal No.3 of 1970 preferred by the plaintiff on the same grounds were dismissed by the Courts, present suit was barred by principle of res-judicata. It was stated by them that since the suit land was sublet to them on 1-1-1964, rent from 1-1-64 to 31-12-1965 was paid to the deceased Sundarlal and the defendant Nos.5 and 6 and rent for six months from 1-1-1965 paid by cheque as well as rent paid by cash thereafter was not accepted by them as they are in collusion with the plaintiff, no fault was fault committed by them. It was also stated that amounts deposited by them towards rent in Regular Suit No.18 of 1965 in the Court of Civil Judge (J.D.) at Bardoli for specific performance of the agreement has not withdrawn by the plaintiff, instead filed the false suit. Since the Regular Suit No.18 of 1965 was dismissed, appeal was filed and same was allowed thereby relief for specific performance of the agreement was granted. It was further stated that an amount of Rs.4,000/- deposited in Regular Civil Suit No.20 of 1965 was not withdrawn by the plaintiff and hence, the suit may not be entertained and be dismissed with costs.

2.5 The defendant No.9 also filed his written statement at Ex.47. It was contended that he was not a sub-tenant but only a dealer of defendant Nos.7 and 8 having no concern with the agreement executed between the deceased Sundarlal and the defendant Nos.5 and 6 and, therefore, he is not a necessary party to the suit. He was also denied to have made any illegal constructions on the suit land and also any damage caused to the suit land as it was used by defendant Nos.7 to 11, but value of it was increased as patrol pump was installed by the defendant Nos.7 and 8. It was stated that defendant Nos.10 and 11 were not sub-tenants of the suit land but they were rendering services to the customers and finally

it was prayed to dismiss the suit with costs.

2.6 In the written statement submitted by the defendant No.10 at Ex.40, it was contended that he is a sub-tenant of the suit land and he was kept there for providing facilities to the customers coming to the patrol pump. It was stated by him that he is running a hotel on the kachha shed made by the defendant No.9 on the suit land.

2.7 In the written statement submitted by the defendant No.11 at Ex.51, it was contended that he is not sub-tenant of the suit land and he was wrongly joined as a party. It was stated that he is doing the work of shaving on the kachha shed made by the defendant No.9 on the suit land and he never used to pay any rent for that.

2.8 Necessary issues for determination were raised by the learned Judge at Ex.60. Considering the submissions made by the learned advocates appearing on behalf of the respective parties, the learned Civil Judge (S.D.), Surat has decreed the suit of the plaintiff by the judgment and decree dated 31-12-1976 which is giving rise to file the present first appeal.

3. Heard Mr.S.H.Sanjanwala, learned advocate for the appellants, Mr.K.I.Shah, learned advocate for the respondent No.3 and Mr.B.J.Shelat, learned counsel for Mr.G.N.Shah, learned advocate for the respondent Nos.7 and 8. Respondent Nos.1 to 2, 4 to 6 and 9 to 11 are served, but they did not appear either personally or through advocate.

4. The first argument advanced by the learned advocate for the appellants is regarding issue Nos.2,3 and 7-B raised by the Court below i.e. sub-letting, unauthorised construction and profiteering. For that, he has taken me to the oral evidence of the plaintiff, his brother together with the evidence of otherside and also the documentary evidence on record including the rent note Ex.101 and relevant discussion made by the Court upon those issues in the judgment. Mr.B.J.Shelat, learned counsel for the respondent Nos.7 and 8 has argued that prior to raising those issues in the present suit as well as in appeal, above referred issues were specifically framed in Regular Civil Suit No.20 of 1965 and were finally decided by the learned Civil Judge (S.D.), Bardoli and thereafter in Regular Civil Appeal No.3 of 1970 before the District Court and hence, same are barred by the principle of res-judicata and Court below has also held the same thing in its judgment.

Therefore, now it is not open for the appellant-original plaintiff to raise the same issues here in this suit and appeal.

5. I entirely agree with the argument advanced by the learned counsel for the respondent Nos.7 and 8 that principle of res-judicata will apply in the above referred issues and court below has rightly held the same and while doing so, Court below has reproduced all the previous issues and discussed at length and came to the proper and only conclusion which is not required to be disturbed by this Court. Over and above, as established from the record and proceedings that real and only document which is the heart of the dispute between the parties is the rent note Ex.101. It is clear from the rent note that right of sub-letting has been given to the otherside and what type of construction is required to be made was not specifically mentioned in the rent note. By the said rent note, defendants were permitted to have a construction for purpose of installing the patrol pump and it has been established from the record and proceedings and from the evidence on record that upon the suit land, they have installed patrol pump and size is not mentioned and, therefore, question of small or big does not arise. The construction of compound wall for the patrol pump does not amount to unauthorised construction in view of the terms and conditions of the rent note and other construction carried out is for the purpose of providing services to the customers who visit the patrol pump and, therefore, it cannot be said that above referred construction is unauthorised one. But it can be said that it is a construction made for installing the patrol pump and detailed discussion has been made by the Court below while deciding above issues and, therefore, it is not necessary to reproduce the same again here in this first appeal.

6. The second and important point which has been raised by the learned advocate for the appellants is regarding the arrears of rent by claiming that plaintiff had claimed rent from 17-1-1965 to 29-2-1972 at Rs.199/per month together with mense profit of Rs.34/-from 1-3-1972 till the date of filing of the suit and thus, the total amount of Rs.16,949/- has been claimed by the plaintiff. He has drawn my attention towards ex.39, which is the written statement filed by the defendant No.5 and argued that nowhere it has been mentioned by the defendant No.5 that he has paid rent to the plaintiff and defendant Nos.1 to 4 and 6 are ex-parte and, therefore, according to him, defendants are tenants

in arrears and even court below has also held issue No.4 in affirmative. He has further argued that since the defendants have committed breach of terms of lease deed by not paying rent regularly, the plaintiff is entitled to recover the possession of the suit land and Court below ought not to have given relief against forfeiture for non-payment of rent under sec.114 of the Transfer of Property Act to the defendants. On this point, Court below has also given the relief against forfeiture for non-payment under Sec.114 of the Transfer of Property Act relying upon the case reported in 48 B.L.R. page 608 in the case of Ladhuram Manormal Vs. Chimniram Dongardas wherein the Court has held that "we have no doubt that the privilege of the lease in respect of the right to relief against forfeiture can in proper case be extended to his assignee where the assignee acquires his right by transfer by order or by operation of law". Relying upon the same, court below has held that defendant Nos.7 and 8 are legally sub-tenants under the terms of lease deed and, therefore, above referred case law is fully applicable to the facts of the present case.

7. Next point raised by the learned coulsel for the appellants is that during the pendency of this appeal, lease period came to an end and, therefore, relief against forfiture cannot be granted to the otherside for which, Mr.Sanjanwala, has relied upon Dattonpant Gopalvarao Devakate Vs. Vithalrao Marutirao, AIR 1975 S.C. 1111 wherein the Apex Court has held that no notice is necessary if a lease of immovable property determines under clause (a) of Section 111 by efflux of the time limited thereby. It has been held by the Apex Court at head note (D) as under:

"Transfer of Property Act (1882), S.111--Tenancy determined by efflux of time--Notice to quit."

Relying upon the above reported judgment, he has argued that lease would be determined by efflux of time and even if forfeiture is relieved against, the lessee would have held the property only for the period fixed upto the end of lease period. Here in this case also, lease period has already expired during the pendency of the First Appeal and, therefore, question of granting relief against forfeiture does not arise in this case. In this connection, relying upon the case of Shyamlal Agarwala Vs. Smt.Nanda Rani Dassi, AIR 1988 Calcutta 133, he has argued that as held by the Apex Court in this reported case, relief under Sec.114 of the Transfer of Property

Act can be granted even at the appellate stage. According to him, even notice is not required as decided in Dattonpant Gopalvarao Devakate (supra).

7.1 He has also relied upon the case of Bhawanji Lakhamshi and others Vs. Himatlal Jamnadas Dani and others, AIR 1972 S.C. 819 wherein Apex Court has held in para 9 as under:

> "The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. There is a distinction between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. The assent of the landlord to the continuance of possession will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise."

7.2 He has also relied upon the case of Associated Hotels of India Ltd. Vs. S.B.Sardar Ranjait Singh, AIR 1968 S.C.933 and argued that in the present case, Court below ought not to have granted relief against forfeiture to the original defendants because they are not the tenants of the appellant-original plaintiff and during the pendency of this First Appeal, lease period has expired and, therefore, as decided by the Calcutta High Court in Shyamlal Agarwala (supra), the defendants will not get the benefit of forfeiture because it is only a futile exercise and Court can straightaway pass a decree at the appellate stage without issuing notice under Sec.111 of Transfer of Property Act.

8. Whereas Mr.Shelat, learned counsel for the respondent Nos.7 and 8 has argued that relief against forfeiture can be granted at any stage and even it can be granted at appellate State. According to him, appeal is a continuation of the proceedings for which, he has

relied upon the above referred judgments together with the terms of the lease agreement and argued that there is no terms for re-entry into the land in question and Court should also keep in mind the subsequent event in the matter.

9. Here in this case, as discussed earlier, a peculiar circumstance has arisen wherein firstly the plaintiff has filed the Regular Civil Suit No.20 of 1965 for the same cause of action and same has been decided between the parties upto the appellate level and it has become final between the parties and as held by the Court below, vide rent note Ex.101, the lessee has got right to sub-let the property and, therefore, it has been sub-let to the defendant Nos.7 and 8 which is quite legal. It appears that the defendant No.6 is the brother-in-law of the plaintiff and defendant Nos.1 to 4 and 6 have not appeared and defended the suit and all of them, in collusion with the plaintiff, has come against the defendant Nos.7 and 8 and, therefore, they have not paid the rent to the plaintiff instead deposited the rent into the Court below in Regular Civil Suit No.20 of 1965. However, Court below has categorically held in the judgment delivered in the present suit that calling for the money deposited in another suit in another Court cannot be ordered to be paid to plaintiff and after taking into consideration all aspects of the matter, he has put Sec.114 of the Transfer of Property Act in motion and and it is clear from the judgments relied upon by the learned counsel for the parties including the case of Ladhuram (supra) that relief against forfeiture can be granted at any stage. It is also established that the appeal is a continuation of proceedings and, therefore, even it can be granted at appellate stage as held by the Calcutta High Court and, therefore, Court below has rightly given benefit to the defendants looking to various aspects of the matter including the law laid down by the Courts and I do not find it necessary to interfere with the said finding either on facts or on law. As far as the contenting of expiry of lease period is concerned, looking to the peculiar facts of this case, question of efflux of time cannot be decided at this stage as it raises many other questions for which, opportunities are required to be granted to the parties. In these circumstances, the point raised by the learned counsel for the appellants that as lease period has already expired during the pendency of this appeal, the decree may be passed at this stage, cannot be taken into consideration. If at all appellants have got any right on any aspect, they are entitled to avail the same which may be available to them under the law. But same cannot

be granted here at this stage as, I have discussed earlier, there are points which may arise and, therefore, this Court cannot deal with the above point here at this stage.

10. Considering the submissions made on behalf of the parties as well as rent not Ex.101 and going through the judgments relied upon by the learned counsel for the respective parties, I am of the opinion that judgment and decree passed by the Court below are just, legal and proper. Reliance can be placed on the decision of the Apex Court reported in 2001 AIR SCW 3452 in the case of Laxmidas Bapudas Barbar and another Vs. Smt.Rudravva wherein it has been held as under:

> "After enforcement of Rent Act a fixed term contractual lessee can, during subsistence of the lease, be evicted only on grounds of eviction provided under the Rent Act and that too only if such grounds have been provided as one of the grounds for forfeiture of lease rights in the lease deed."

Hence, in view of the judgments delivered in Shyamlal Agarwala and also Laxmidas Bapudas Barbar, the contention raised by the learned counsel for the appellants that since the lease period has expired during the pendency of the First Appeal and hence, decree for possession should be passed by this Court cannot be accepted and hence, the present First Appeal is required to be dismissed.

11. First Appeal is dismissed. Notice is discharged.

(R.P.DHOLAKIA,J.)
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